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An e-newsletter from
Lakshmikumaran & Sridharan, India

July 2017 / Issue – 73

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July
2017

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Authority for Advance Rulings under GST

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In his Budget Speech of 1992-93, the then Finance Minister had assured that, in the interest of avoiding needless litigation and promoting better taxpayer relations in a scheme for giving advance rulings in respect of transactions involving non-residents, was being worked out and would be put into operation[1]. Though the system was only implemented in 1993, the concept of Advance Rulings was conceptualized in the Direct Taxes Enquiry Committee, 1971 headed by Justice K.N. Wanchoo. Advance Rulings were conceived to furnish taxpayers with an avenue where interpretation of tax laws could be sought. The Authority for Advance Rulings ('AAR') was instituted as a mechanism to prevent litigation, pre-empt or plan tax liability, and to generally foster a business-friendly environment where taxpayers may approach Revenue authorities for ascertaining the proper legal position.

From the bygone era of laws dealing with Central Excise, Value Added Tax [but for those commodities whose debut in Goods and Services Tax ('GST') is yet to be notified] and Service Tax, the concept of issuing Advance Rulings has been grandfathered into the GST regime as well. This article discusses the provisions under which an AAR has been set up, functions of AAR and its effects on one of the largest tax-paying nations in the world.

A Brief

As per the scheme of GST Laws enacted in the country this month, an assessee may seek clarification on specific matters or questions relating to the supply of goods or services or both from the AAR. In addition, the GST Laws provide for an Appellate Authority for Advance Rulings ('AAAR') to deliberate over matters which have been deemed not determinable by the AAR or to adjudicate those advance rulings over which the applicant or other interested persons, viz. concerned officer or jurisdictional officer, is aggrieved.

Advance Rulings - Scope and Procedure

Sections 95 to 106 in Chapter XVII of the Central GST ('CGST') Act deal with Advance Rulings. An 'advance ruling' has been defined as a decision provided by the AAR or AAAR to an applicant on specified matters or questions in relation to the supply of goods or services. Interestingly, the definition of an advance ruling permits not only those supplies that are proposed to be undertaken, but also those supplies which are already being undertaken. The usage of the term 'advance ruling', therefore, is not literal enough to reject queries arising from existing transactions or supplies already being undertaken by the supplier. An 'applicant' has been defined as any person registered or desirous of being registered under the CGST Act. Again, it is noteworthy that even those persons

[1] Chaturvedi and Pithisaria's, Income Tax Law, 7458 (Wadha Nagpur, 5th, 2001).

who anticipate their liability to be registered may obtain a clarification on that aspect.

An AAR constituted under the provisions of a State GST ('SGST') Act or Union Territory GST ('UTGST') Act would be deemed to be the authority for advance ruling in respect of that State or Union Territory. To illustrate, the AAR or AAAR in the National Capital Territory of New Delhi would be termed as 'Delhi Authority for Advance Ruling' ('DAAR'), or the 'Delhi Appellate Authority for Advance Ruling' ('DAAAR'). The CGST Act specifically provides that the State AAR will provide advance rulings in respect of the CGST Act.

'An Application' seeking advance ruling is required to be made by stating '**the question**' on which an advance ruling is sought, in the prescribed form and manner, upon payment of requisite fees. At this juncture, it is pertinent to note that the singular form of the word 'question' has been employed in this Section. A straightforward reading of Section 97(1) suggests that an applicant may raise only one query in every application made before the AAR. However, a perusal of the Application form in FORM GST ARA-01 indicates that it provides for seeking clarification on multiple issues under a single application.

In a significant move, the CGST Act prescribes certain questions in relation to which an advance ruling may be sought, and lists out the following queries:

- Classification of goods or services or both
- Applicability of a notification issued under GST Acts
- Determining time of supply of goods or service or both,
- Determining value of supply of goods or service or both
- Eligibility to ITC
- Liability to be registered, and lastly;
- Characterization as 'supply of goods or services or both'

Thus, the scope for which an advance ruling may be obtained has been categorically prescribed under the above list, which is exhaustive, and no queries other than those featured above would be entertained for advance rulings. Consequently, issues in respect of the nature of tax liable to be paid, export and import matters requiring clarification, determination of location of the supplier are not matters which can be clarified by the AAR. Adverting to the Integrated GST ('IGST') Act for clarity is of no avail here as it directly borrows and incorporates these provisions *mutatis mutandis*. Effectively, the range of issues on which advance ruling may be sought becomes severely reduced.

Processing of applications before the AAR

The CGST Act then prescribes the procedure to be followed on receipt of the application. It states that the AAR is to forward a copy of the application to the 'concerned officer', and may seek relevant documents where necessary. The AAR may admit or reject the application, though no application may be rejected without the applicant being granted an opportunity of personal hearing. Specifically, the AAR is barred from admitting an application in circumstances where the query raised is already pending or has been decided in any proceedings under the CGST Act. The specific use of the words 'in the case of an applicant' unearths doubts revolving around the extent of the AAR's power to reject an application where the query raised is pending or decided in any proceedings under the CGST Act. Can the AAR bar an applicant from seeking an advance ruling because the issue is pending

adjudication in any application filed by an unknown party before it, or does the provision only seek to restrict applications where the law has already been declared? On perusal of the application format in FORM GST ARA-01, it becomes clear that the restriction on the AAR is limited to admitting an application where the question raised has been adjudicated, or is pending adjudication **in the applicant's own case**.

Time-limits

The AAR is required to issue its ruling on the query raised in the application within a time limit of 90 days. Upon the issuance of an advance ruling, the AAR is to dispatch a signed and certified copy of the Advance ruling to three parties, viz. the applicant, the concerned officer and the jurisdictional officer. It is significant to note that there is no definition nor any elaboration on the terms 'concerned officer' or 'jurisdictional officer', though the officers have been repeatedly referred to in the provisions for advance rulings. Thus, it may be presumed that a notification in this regard is in the offing.

Appeal mechanism in respect of advance rulings

The CGST Act has also instituted an appeal mechanism by way of the AAAR. An appeal before the AAAR may be preferred:

- By the AAR itself - where the members of the authority are of differing views, the AAR may refer the question to the AAAR.
- From the aggrieved party - the applicant, the concerned officer, or the jurisdictional officer may appeal to the AAAR within a period of 30 days from the date on which the advance ruling was received by all of them.

In a significant measure, the three parties (Applicant, concerned officer or jurisdictional officer) have the right to appeal against the advance ruling issued by the AAR before 30 days from the latest date on which the advance ruling was received by the abovementioned three parties. For example, where the advance ruling has been pronounced on 10-7-2017 and the applicant and the concerned officer receive the same on 12-7-2017 but the jurisdictional officer receives it on 15-7-2017, the date of reckoning for time limit to prefer an appeal before the AAAR is 15-7-2017 despite the applicant having received it on 12-7-2017. Nonetheless, the AAAR is empowered to condone the delay if sufficient cause for the same is demonstrated.

Whereas a difference of opinion amidst the members of the AAR would lead to that issue being referred before the AAAR, in circumstances where the members of the AAAR differ on any point before it in appeal or reference, it shall be deemed that no advance ruling can be issued in respect of the query posed in the appeal or reference. Thus, the above provision spells a veritable dead-end for proactive taxpayers who seek to have their stance abundantly clarified to avoid any prosecution.

At this juncture, the apposite point for consideration is the way forward for an applicant whose appeal before the AAAR has been deemed as unresolvable. Does the applicant await audit, or does the appellant escalate the issue by preferring a writ before the jurisdictional High Court(s)?

Binding nature of the Advance Rulings

Under Section 102, the CGST Act contemplates the rectification of an advance ruling by the AAR or the AAAR, where such error

is apparent on the face of record. Such rectification may be sought by the applicant, the concerned officer, the jurisdictional officer or the appellant within 6 months from the date of the order. It has been specified that the advance ruling shall be binding only on the applicant for the matters already specified, the concerned officer and the jurisdictional officer. The advance ruling shall bind the abovementioned persons unless laws, facts and circumstances involved in the application have changed.

Hitherto, an advance ruling would cement the position of law in **respect of the issue over which clarity has been sought**. The CGST Act makes a marked departure from this position by stating that the advance ruling would be binding only on the applicant, the concerned officer and the jurisdictional officer. Consider, for example, Company A requires clarification on the classification of its product 'Choco-fills'. Company B had already raised the same question in respect of its product 'Choco-Fillz' before the DAAR and an advance ruling was obtained by Company B that the choco-fillz are biscuits. Since the advance ruling obtained by Company B is binding only on it and the concerned officer and jurisdictional officer in that case, there is no clarity on whether Company A may directly follow the advance ruling obtained by Company B or whether the matter should be pursued afresh. Thus, where the Choco-fillz may be ruled as a biscuit for Company B, the same Choco-fills sold by Company A may be held as chocolate wafers because of this seemingly small but significant deviation. This deviation espouses more chaos than compliance, and would lead to mounting applications and litigation.

To conclude, the laws have provided for a seemingly approachable mechanism to mitigate tax prosecution and to foster higher compliance. Whether or not it achieves the true objective of setting up an assessee-friendly body to unburden Courts or the Revenue officials, remains to be seen.

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Goods and Services Tax (GST)

Circulars and Clarifications

Textiles – GST rate structure clarified: Summarising the tax rate structure for the textile sector, Ministry of Finance in its Press Release dated 18-7-2017 has stated that GST rate structure for the Textiles Sector would enable ease of classification and determination of rate. Further, demand of the textile traders to not apply any tax on fabrics has been rejected by the Ministry observing that absence of GST on fabrics will break the input tax credit chain and then the garments / made-ups manufacturers will not be able to get the credit of tax on previous stages. It was also noted that nil GST on fabrics will result in zero rating of imported fabrics, while domestic fabrics will continue to bear the burden of input taxes. Presently all fabrics are liable to 5% GST and refund of unutilised input tax credit is not available.

Margin scheme for dealers of second-hand goods: Finance Ministry has on 15th of July clarified that Margin Scheme, as envisaged under Rule 32(5) of the Central Goods and Services

Tax Rules, 2017, can be availed by any registered person dealing in buying and selling of second hand goods (including old and used empty bottles), provided the conditions laid therein are satisfied. Rule 32(5) deals with valuation in respect of supply of second-hand goods and states that the value of supply shall be the difference between the selling price and the purchase price. The scheme is available further on the condition of non-availability of input tax credit.

The Press Release issued in this regard also clarifies that exemption under Notification No. 10/2017-Central Tax (Rate) to such dealers in respect of such goods purchased from non-registered person, enables avoidance of double taxation on the outward supplies made by such registered person since such dealers are not eligible to input tax credit. It may also be noted that receipt of such goods from unregistered dealers has also been exempted from GST Compensation Cess by Notification No. 4/2017-Compensation Cess (Rate), dated 20-7-2017.

Hotel accommodation – Star rating not material for GST rate: Ministry of Finance has clarified that star rating of hotels is not relevant for determining the applicable rate of GST. The Press Release dated 18-7-2017 issued in this regard reiterates that accommodation in any hotel, including 5-star hotels, having a declared tariff of a unit of accommodation of less than INR 7500 per unit per day, will attract GST @ 18%.

GST migration and new registration - Trade advisory: Office of the Commissioner of Sales Tax, Maharashtra has issued an elaborate Trade Advisory to clarify various issues arising during the course of migration of existing taxpayers and in respect of new registration. The Trade Circular dated 15-7-2017 issued for this purpose clarifies that in respect of registration of different vertical with same PAN, taxpayers are expected to use different mobile number and e-mail ID for each business vertical. The Circular also specifies the procedure for changing the mobile number and e-mail ID of authorised signatory in GST registration database.

For GST Acts, GST Rules and Notifications (Central and States), Circulars, Press Releases and Notes, please use Knowledge tab in www.gst.lakshmisri.com .

Customs

Circulars

Foreign Trade Policy – Changes pursuant to implementation of GST: DGFT has issued a comprehensive Trade Notice to highlight major changes in the provisions of the Foreign Trade Policy consequent to implementation of the Goods and Services Tax (GST) from 1st of July. The Duty Credit Scrips issued under Chapter 3 of the FTP cannot be used for payment of IGST and GST Compensation Cess on imports, and CGST, SGST, IGST and GST Compensation Cess for domestic procurement. Further in case of imports under Advance Authorisation or under EPCG, no exemption from payment of Integrated GST and the GST Compensation Cess, would be available. Advance Release Order facility is also not available, except in case of some specified products. EOUs will now be required to pay IGST or CGST & SGST in case of imports and

domestic procurement respectively. Trade Notice No. 11/2018, dated 30-6-2017 has been issued in this regard.

EOU operations post implementation of GST – Clarifications: Pointing out various operational issues relating to EOUs after implementation of GST, CBEC has clarified that B-17 bond would suffice and the EOUs are not required to submit separate continuity bond under the new IGCR Rules, 2017. It has also been clarified that inter-unit transfer of goods would be on invoice on payment of applicable GST, i.e. the supplier unit will endorse on such documents the amount of customs duty, availed as exemption, if any, on the goods intended to be transferred. The recipient unit would be responsible for paying such BCD, as is obligated under Notification no. 52/2003-Cus., when the finished goods made out of such goods or such goods are cleared in DTA. Further for such inter-unit transfers no procurement certificates would be required. Circular 29/2017-Cus., dated 17-7-2017 also clarifies various other issues relating to EOUs.

Guidelines for re-testing of samples: CBEC has prescribed detailed guidelines for allowing re-testing of samples when the first test gives an adverse finding. An application for re-testing is to be made within ten days from receipt of the original test result. The re-test is to be done on the remnants of the original sample. However, if fresh samples are to be drawn the same has to be done in the presence of the importer/ CHA. Uniform procedure for re-testing, according to Circular No. 30/2017-Cus., dated 18-7-2017 issued for this purpose, is a trade facilitation measure under the WTO's Trade Facilitation Agreement to which India is a signatory.

It may also be noted that a 76 point National Trade Facilitation Action Plan (NTFAP) has also been released by the Indian government on 20th of July with the objective of improvement in ease of doing business by reduction in cargo release time and cost, move towards paperless regulatory environment, transparent and predictable legal regime and improved investment climate through better infrastructure.

Import for personal use through courier – Restrictions under ITC (HS) Heading 9804 not applicable: CBEC has clarified that Policy conditions under Heading 9804 of the ITC(HS) will not be applicable to imports through courier and that such imports would be eligible to concessional rate of BCD provided these are intended for personal use. Instruction No. 9/2017-Customs, dated 5-7-2017 has been issued in this regard. It may however be noted that DGFT by Notification No. 16/2015-20, dated 12-7-2017 has amended Chapter Note 4 of Chapter 98 of ITC(HS), which made Heading 9804 non-applicable to courier imports and was relied upon by the authorities in the said Instruction.

Ratio decidendi

Project import benefits available even when imported machinery relocated: CESTAT Mumbai has rejected the contention of the department that concessional rate of duty under Project Imports is conditional upon retention of the imported goods at the location specified and with the importer. Allowing the benefit to machinery which was relocated after import, it was observed that transfer of ownership or re-location of the project after installation and meeting with the project objectives would not erase the classification and assessment that prevailed at the time of import. Browsing the provisions of Project Import Regulations, it was noted that there was no such restriction in the Regulations or in the connected notifications. [*Whirlpool of India Ltd.* v. *Commissioner* - 2017-VIL-577-CESTAT-MUM-CU]

Refund – Rebuttable presumption of unjust enrichment: Madras High Court has dismissed the appeal against the order of the CESTAT which had held that the Chartered Accountant's certificate was not conclusive evidence in respect of absence of unjust enrichment. The assessee had not only filed the CA certificate, but had also placed on record, the balance sheet for the relevant period, as well as the ledger account. The Court however, observing absence of invoices for the transactions, held that before the assessee reaches the stage of rebuttal of statutory presumption in terms of Section 28-D of the Customs Act, 1962, it would have to place on record, the necessary primary documents based on which entries were made in the ledger and the balance sheet was drawn up. It was also observed that the transactions adverted to in a ledger or in balance sheet can only, at best, be secondary evidence. [*Shoppers Stop Ltd.* v. *Commissioner* - 2017-VIL-367-MAD-CU]

EOU – Sales Tax reimbursement in case of procurement from another EOU: Analysing the phraseology of Para 6.11 of the Foreign Trade Policy 2004-09, the Gujarat High Court has allowed the benefit of reimbursement of sales tax in a case involving procurement of raw material from another EOU. It was held that the policy wherever intended to limit the benefit of an EOU on procurement made from a DTA unit, it was so specifically provided. The Court in this regard noted that Hand Book of Procedures and in particular Appendix14-I-I contained therein, providing that such benefit would be available only on procurement from DTA, does not lay down any policy but prescribes only the procedure to be followed for reimbursement of CST. It was held that the restriction under Appendix would run counter to the terms of the FTP itself and is *ultra vires* the powers of the Director General of Foreign Trade. [*Asahi Songwon Colors Ltd.* v. *Union of India* - 2017-VIL-358-GUJ-CU]

Confiscation under Section 111(o) when exemption not available: CESTAT Bench at New Delhi has set aside confiscation made under Section 111(o) of Customs Act in a case arising from import of an aircraft engine. It was held that the confiscation of the imported engine was not legally sustainable because there was no scope to apply the provisions of Section 111 (o). The Tribunal in this regard observed that a plain reading of the provision will indicate that it is applicable in respect of any goods which were exempted and in present case exemption was not allowed. Penalty in terms of Section 112(a) was also revoked as it can be imposed for an act or omission which would render the goods liable to confiscation under Section 111.

The importers were claiming exemption from payment of basic customs duty and CVD. The Assessing Officer disallowed their claim for not fulfilling the criteria in the concerned notification. It was stated by the authority that the bill of entry was filed at the time when they were no more functioning as scheduled airline operator. The exemption claimed for the engine was applicable for repair and maintenance of aircraft in connection with scheduled airline operation. [*International Lease Finance Corporation* v. *Commissioner* - Final Order No. 54324/2017, dated 23-6-2017]

Refund of SAD – Non-mention of VAT paid against each item in invoice, not fatal: CESTAT Ahmedabad has allowed the appeal of the importer in respect of refund of SAD under Notification No. 102/2007-Cus., where the commercial invoice did not reflect the description of the accessories in detail but was enclosed with the packing list. The Tribunal in this regard relied on Chartered Accountant's certificate indicating that the value of accessories sold along with the main machine had suffered VAT/CST, even

though the VAT amount was not shown separately against each of the items. [*Equinox Solution Ltd*. v. *Commissioner* – Order No. 11328-33/2017, dated 30-6-2017, CESTAT Ahmedabad]

Drawback – Delay in submission of brand rate application – Liberal approach required: In a case where the application for brand rate of Drawback was filed beyond the stipulated period of 60 days, CESTAT Ahmedabad has allowed the appeal of the assessee. Observing that liberal approach needs to be adopted in condoning the delay, the Tribunal took note of the explanation of the exporter that they could not receive relevant shipping documents from the CHA. Delay in filing the application, which was less than 30 days, was hence condoned. The matter was remanded to the adjudicating authority for consideration of the applications on merits. [*Adani Wilmar Ltd.* v. *Commissioner* – Order No. 11272/2017, dated 12-6-2017, CESTAT Ahmedabad]

ROM Application to be filed within six months from date of 'receipt of order': The Bombay High Court has held that Rectification of Mistake (ROM) application under Section 129B of the Customs Act, 1962, is to be filed within six months from date of 'receipt of order' and not from date of order. It was noted that the appellant and/or the party would not be in a position to apply for rectification unless and until the actual order is seen and/or verified. Reliance in this regard was placed on Gujarat High Court decision in the case of *Vadilal Industries Ltd.*, relating to similar provisions under Central Excise Act, 1944. [*Allied Fibres Ltd.* v. *CESTAT* - 2017-TIOL-1322-HC-MUM-CUS]

Central Excise

Circulars

Exercise books, printed work books and Children's drawing books – Classification: Central Board of Excise and Customs (CBEC) has clarified that exercise books are classifiable under Heading 4820 of the erstwhile Central Excise Tariff Act, 1985 as printing is only incidental to their primary use. Circular No. 1057/06/2017-CX, dated 7-7-2017 in this regard observes that exercise books are nothing but stationery items having blank pages with lines for writing which may also include printed texts for copying manually. On the same logic, i.e. printing being incidental or not, printed work books and children's drawing or colouring books were held to be covered under Chapter 49, as printing was not merely incidental to the primary use of these two products.

Ratio decidendi

Tyres, tubes and flaps are not parts of automobiles - Valuation not to be under Section 4A: Noting that tyres and tubes are not only used for automobiles, but are used in animal drawn vehicles, aircrafts and in various other machineries, CESTAT Delhi has held that tyres, tubes and flaps are not parts of automobiles to be valued under Section 4A of the Central Excise Act, 1944. The Tribunal in this regard took note of the various decisions of the Supreme Court holding that for classification, the test of commercial identity and not the functional test should be applied, and that for the purpose of

classification, it is required to be determined as to whether how such article is understood in "common parlance" or in "commercial world" or in "trade circle" or "in its popular sense meaning". [*J.K. Tyre & Industries Ltd.* v. *Commissioner* - Final Order No. 54322/2017, dated 23-6-2017, CESTAT Delhi]

Body building of vehicles - Classification and exemption: CESTAT Delhi has held that goods, i.e. bodies built on chassis received from the customers would be classifiable under Heading 8704 as motor vehicles for transport of goods and not under 8707 as bodies of vehicles. Relying on Chapter Note 5 of Chapter 87 of the erstwhile Central Excise Tariff, 1985, it was held that the product cleared by the assessee after body building activity is a "manufactured" motor vehicle classifiable under Heading 8704. It was also observed that classifying such product under Heading 8707 as simply bodies for motor vehicle will be against the legal provision as stipulated in Note 5. [*Commercial Engineers & Body Builders Co. Ltd.* v. *Commissioner* - Final Order No. 54085-54086/2017, dated 20-6-2017, CESTAT Delhi]

Area based exemption in Himachal Pradesh - Simultaneous availment of exemption and payment of duty after taking credit, available: Chandigarh Bench of the CESTAT has held that there is no bar on the assessee under Notification Nos. 49/2003-C.E. and 50/2003-C.E. in respect of availment of credit on similar inputs and clearing the manufactured goods on payment of duty. The exemption notifications provided for exemption to specified goods manufactured at specified locations in the State of Himachal Pradesh. The Revenue department was of the view that since the assessee was availing exemption notification, they were not entitled to take credit on inputs and to clear manufactured goods on payment of duty as per Incentive Package Policy. [*Commissioner* v. *Varahi Plastic (P) Ltd.* – Final Order No. 61074-61076/2017, dated 13-6-2017, CESTAT Chandigarh]

Multi-media speakers with woofer having FM radio – Classification: Multi-media speakers with woofer having FM radio are classifiable as speaker and not as radio communication receiver. Allowing assessee's appeal, CESTAT Delhi was of the view that FM radio was clearly an added in-built feature. It was held that the original authority fell in error in appreciating commercial parlance and applicable scope of tariff entries in terms of provisions of section or Chapter notes. Reliance in this regard was also placed on decision in the case of *Logic India Trading Company* involving classification of multi-media speakers having additional feature of USB port and FM radio. [*Global Enterprises* v. *Commissioner* – Final Order No. 54622-54629/2017, dated 4-7-2017, CESTAT Delhi]

Gold covered miniature cars classifiable as gold article and not toys: CESTAT Chennai has held that miniature cars covered with gold are to be classified under Chapter 71 as gold article, and not under Chapter 95 covering toys. The Tribunal was of the view that taking into consideration the proportion of gold content (200 grams) in the cars with regard to plastic content (300 grams), it cannot be said that the gold content was a minor constituent. Benefit of exemption Notification No. 6/2002-C.E. (Sl. No. 171) was also allowed to the assessee. [*Titan Industries Ltd.* v. *Commissioner* – Final Order No. 41027-41028/2017, dated 19-6-2017, CESTAT Chennai]

Service Tax

Notification

ST-3 or ST-3C Returns to be filed by 15th of August: ST-3 or ST-3C Returns for the period from 1st of April, 2017 till 30th of June, 2017 have to be filed by 15th of August, 2017. Service Tax (Fourth Amendment) Rules, 2017 issued for this purpose also provide that the revised Return for the same period has to be submitted within 45 days of filing of the abovementioned Return. Rules 7 and 7B of the Service Tax Rules, 1994 have been amended in this regard by Notification No. 18/2017-S.T., dated 22-6-2017.

Ratio decidendi

Import of services – Commission paid to foreign agent when not liable to tax: Observing that the Indian assessee involved in hotel industry had never advised its foreign clients to approach persons appointed in foreign countries for booking of accommodation in its hotel, CESTAT Delhi has held that the hotel would not be liable to service tax under reverse charge mechanism. The Tribunal in this regard held that the assessee in India was not in picture as far as provision of service by the foreign agent is concerned and that the service was provided and consumed outside India. [*Indian Hotel Co. Ltd.* v. *Commissioner* – Final Order No. 54779/2017, dated 7-7-2017, CESTAT Delhi]

Cenvat credit not available on input services attributable to trading even prior to 2011: CESTAT Delhi has held that Cenvat credit on input services used in trading would not be available even for the period prior to 1-4-2011 when 'trading' was included in the definition of 'exempted services'. The Tribunal was of the view that if trading is not to be considered as even exempted service, then Cenvat credit scheme itself would not be available to the trader. It was observed that allowing credit would in effect nullify the very principle that Cenvat credit is not available if there is no taxable output service. [*Commissioner* v. *Machine Tools (India) Pvt. Ltd.* – Final Order No. 54773/2017, dated 6-7-2017, CESTAT Delhi]

BAS – Stopping of bus at certain stops to facilitate business of specified shops, covered: In a case where under an agreement, the assessee undertook to stop the buses carrying the guests, in front of certain shops or emporia who had signed agreement with the assessee, CESTAT Delhi has held the activity would be covered under the definition of Business Auxiliary Service. The CESTAT held that the service was in the nature of promotion of sale of goods of the clients, and the facilitation fees received from the shops was commission for the service. The Tribunal however restricted the demand to only for the normal period. [*Rajasthan Tourism Development Corp. Ltd.* v. *Commissioner* – Final Order No. 54546/2017, dated 4-7-2017, CESTAT Delhi]

Renting of immovable property service – Renting out building for residence along with personal office, not covered: Rejecting the view of the department that since the term 'personal office' was also mentioned along with word 'residential' in the lease agreement of the immovable property, the amount received would be liable to tax under Renting of Immovable Property Service, CESTAT Delhi has set aside the demand of Service tax. The occupant of the building was an employee of the lessee in respect of the said premises. The Tribunal in this regard noted that the purpose of letting out was

only residential and that even if the said employee did attend to some office work, the same will not make the use of the premises as other than residential. [*Jumera Promoters and Developers Ltd*. v. *Commissioner* – Final Order No. 53733/2017, dated 5-6-2017, CESTAT Delhi]

Threshold exemption under Notification No. 6/2005-ST - Co-owners receiving lease rent separately, eligible: CESTAT Ahmedabad has held that co-owners of the property receiving lease rent separately in proportion to share in a property, are all eligible for threshold exemption under Notification No. 6/2005-ST separately. Revenue department's contention that all co-owners are to be treated as association of persons and service tax on total rent is to be collected from one of the co-owners, was hence rejected by the Tribunal. Further, contention that since property is indivisible, tax is to be levied on total rent without appropriation against co-owners, was also rejected by the Tribunal observing that tax is not necessary to be identified with physical demarcation of immovable property given on rent. [*Commissioner* v. *Sarojben Khusalchand* - Order No.A/10772-10816/2017, dated 28-4-2017, CESTAT Ahmedabad]

Club or Association service - Loyalty program for customers entitling them for various discounted services in affiliated hotels, not covered: Observing that loyalty program for customers entitling them for various discounted services in affiliated hotels, does not lead to formation of a club or association, CESTAT Delhi has set aside the demand of service tax under the Club or Association service. The Tribunal was of the view that members of such programme cannot be considered as members of club or association, to be taxed under the category of "club or association". [*Bharat Hotels Limited* v. *Commissioner* - Final Order No. 53354/2017, dated 18-5-2017, CESTAT Delhi]

Business Exhibition service – Allowing display of advertisement: CESTAT Delhi in the abovementioned dispute, has also held that by allowing display of an advertisement board in the premises of the hotel, the assessee did not become an organisor of a business exhibition. The Tribunal in this regard observed that there was no evidence of assessee holding any business exhibition and allowing the bank as exhibitor. The assessee had allowed a bank to display its board in their premises. [*Bharat Hotels Limited* v. *Commissioner* - Final Order No. 53354/2017, dated 18-5-2017, CESTAT Delhi]

VAT

Notification & Circular

Odisha VAT – No TDS on works contract from 1-7-2017: Deduction of VAT at source from payment made to works contractors is not required to be made by the deducting authorities with effect from 1-7-2017 as the provision for deduction of tax at source from such payments has been omitted by the Odisha VAT (Amendment) Act, 2017. The deducting authorities shall be held liable for penal action if deductions are made from the payment made to contractor in violation of the said direction. Memo No. FINCT1TAX0020201719943/F, dated 30-6-2017 issued for this purpose also states that the provisions relating to TDS under the Odisha

Goods and Services Tax, 2017 have been deferred.

Kerala Sales Tax – Submission of C Forms and F Forms by September: By Circular No. 9/2017, dated 16-6-2017, the Kerala sales tax authorities have asked dealers to submit 'C' forms, 'F' forms, certificates in E-I and E-II for the period up to March 2017, by 30th June, 2017. Regarding subsequent period transactions, the statutory forms shall be submitted by 30th September, 2017. According to the Circular, assessment at higher rate of tax shall be done in case of those assessees who do not file such forms and the adjustment of concessional rate of CST against the excess input tax credit has to be reversed.

Ratio decidendi

Inter-state or intra-state sale – Moment of transfer of right in goods, relevant: In a case involving movement of goods (packaged drinking water) outside the State, the Advance Ruling Authority has held the transaction to be an intra-state transaction. The Authority in this regard observed that according to the agreement between the buyer and the seller, the buyer was to take delivery of the products on ex-factory basis at the gate of the plant and was to bear the freight and transportation costs, though the seller-dealer was arranging transport of the products to the destination outside the State as specified by the buyer. Further noting that the proprietary rights in the trademark and packing material were held by the buyer and that the dealer lost the title to the goods the moment such goods were handed over to the buyer, it was held that the question of taxing the supply of such goods as inter-State sale does not arise in the hands of the seller-dealer, as the taxable event took place in the State of Andhra Pradesh itself. Reliance for this purpose was placed on Supreme Court decision in the case of *Desai Beedi Company* and Madras High Court decisions in the cases of *Surya Vinayaka Industries Ltd.* and *M.M. Traders*. [*Shuchi Beverages Ltd.* - 2017-VIL-05-ARA]

Inter-state sale – Advance deposit and acceptance of goods at own risk do not make sale an intra-state sale: Gujarat High Court, in a case involving sale through consignment agents outside the State, wherein on lifting the goods from the factory premises the agents would deposit some advance that would be credited in their sales account on receipt of sales notes, has rejected the contention of the Revenue department that the sales were local sales. The consignee agents here were transporting these goods through various modes of transportation to their sellers. The department was also of the view that since the entire sales proceeds were paid immediately and the risk in goods was entirely that of the agent, the impugned sale was a local sale. The Court found no fault in the impugned order of the Tribunal wherein the Tribunal had held that all three essential ingredients of inter-State namely that (i) there was an implied stipulation in the contract regarding inter-State movement of goods (ii) the goods did actually move from one State to another, and (iii) the sale concluded in another State, were satisfied. [*State of Gujarat* v. *Ahmedabad Jilla Sahkari Doodh Utpadak Sangh Ltd.* - 2017-VIL-355-GUJ]

Dry Dock and Fit-out Berth are capital goods for ship building: Observing that the term "plant" would mean an equipment or article necessary for the purpose of that business, Gujarat High Court has held that Dry Dock and Fit Out Berth which are necessary for the purpose of business of the assessee are to be treated as plant/capital goods. The assessee was engaged in the business of ship building / manufacture and repairs of ship. Further, applying the "User Test" it was held that on purchase of cement, sand, steel, greet, concrete, etc., which were used for construction of Dry Dock and Fit Out Berth

(capital goods), assessee shall be entitled to Input Tax Credit. It was noted that it was not possible for the assessee to carry on his business without these capital goods and that these goods which are specialized in nature, were required to be constructed specially and specifically for the purpose of business of the assessee. Input tax credit on LPG and Acetylene Gas used in manufacture of the final product, i.e. ship building, was also allowed by the Court. [*State of Gujarat* v. *Pipavav Defense and Offshore Engineering Company Limited* - 2017-VIL-302-GUJ]

Bhrungraj hair oil, Brahmi hair oil, Bhallatak dantmanjan and Ayurvedic dantmanjan, are drugs and medicines, and not cosmetics or toilet preparations: Interpreting Entry 28A(i) of Schedule II of the Gujarat Value Added Tax Act, 2003, the Gujarat High Court has held that for a product to be covered under the exclusion clause, it needs to first be a cosmetic and toilet preparation. It was observed that the legislative intent behind the clause was to exclude cosmetics and toilet preparations from Entry 28A, and the purpose of including toothpaste and hair oils was to elaborate on the terms cosmetic and toilet preparations. The Court held that the clause cannot be applicable merely by holding that the product in question is toothpaste or a tooth powder, without it qualifying as a cosmetic or toilet preparation. Entry 28A(i) reads as follows: *"Drugs, Medicines and Vaccines including Bulk Drugs but excluding (a) food and dietary supplements including foods for special dietary uses and (b) cosmetics and toilet preparations including tooth paste, tooth powder, hair oil, face and body lotions, cream and soaps."* The High Court held that the products in question, Bhrungraj hair oil, Brahmi hair oil, Bhallatak dantmanjan and Ayurvedic dantmanjan are drugs and medicines, and not cosmetics or toilet preparations, since they are manufactured from Ayurvedic or homeopathic substances. In addition, the products were considered as drugs under the Drugs and Cosmetics Act, 1940 and the manufacturers needed necessary licences for manufacturing them. [*State of Gujarat* v. *Sintex International Limited* - 2017-VIL-321-GUJ]

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